

FTC Regulation of Unfair or Deceptive Advertising: Current Status of the Law

William C. Holmes

Follow this and additional works at: <https://via.library.depaul.edu/law-review>

Recommended Citation

William C. Holmes, *FTC Regulation of Unfair or Deceptive Advertising: Current Status of the Law*, 30 DePaul L. Rev. 555 (1981)
Available at: <https://via.library.depaul.edu/law-review/vol30/iss3/2>

This Article is brought to you for free and open access by the College of Law at Via Sapientiae. It has been accepted for inclusion in DePaul Law Review by an authorized editor of Via Sapientiae. For more information, please contact digitalservices@depaul.edu.

FTC REGULATION OF UNFAIR OR DECEPTIVE ADVERTISING: CURRENT STATUS OF THE LAW

William C. Holmes*

Advertising practices that are unfair or deceptive have long been prohibited by the Federal Trade Commission Act. Yet, as Mr. Holmes indicates, considerable uncertainty still exists concerning the meaning of the terms "unfair" and "deceptive" as they are used in the Act. To help bring needed clarity to the subject, this Article provides an extensive analysis of the applicable legal principles and the various practices that have been prohibited. Mr. Holmes then proposes guidelines to assist the practitioner in analyzing the legality of particular advertisements.

The regulation of advertising by the Federal Trade Commission has undergone many significant refinements and modifications during recent years. New concepts have evolved, while other pre-existing doctrines have been altered to fit altogether new fact situations. The result has been considerable confusion for advertisers and practitioners alike concerning the requirements of the law of advertising mandated by the principal regulatory provision governing the subject—section 5 of the Federal Trade Commission Act (FTC Act).¹

This Article provides needed guidance on the subject by summarizing the current status of the law. Of necessity, the following discussion is by no means an all-encompassing blueprint of everything the law of advertising requires or may require in the future. The various legal principles that will be discussed are protean concepts that continue to change with new fact situations. Nevertheless, advertisers and practitioners should find the Article helpful in determining where the law stands today and where it is likely to go in the future.

First, the Article presents a broad overview of the governing legal principles, including a discussion of the Commission's remedial powers respecting unfair or deceptive advertising practices. Second, particular types of practices that have been held unlawful are analyzed, including directly false or misleading advertisements, impliedly false or misleading advertisements,

* Staff Attorney, Federal Trade Commission, Chicago, Illinois; B.A., Stanford University; J.D., Harvard University. The views expressed in this Article are the author's own and should not be taken as representing those of the Federal Trade Commission or any individual Commissioner.

1. Federal Trade Commission Act, § 5, 15 U.S.C. § 45 (1976 & Supp. IV 1980). For other viewpoints concerning the law of advertising, as regulated by the Federal Trade Commission, see S. KANWIT, *FEDERAL TRADE COMMISSION* (1979) [hereinafter cited as KANWIT]; G. ROSDEN & P. ROSDEN, *THE LAW OF ADVERTISING* (1978) [hereinafter cited as ROSDEN]; Hammer, *FTC Knights and Consumer Daze: The Regulation of Deceptive or Unfair Advertising*, 32 *ARK. L. REV.* 446 (1978); Millstein, *The Federal Trade Commission and False Advertising*, 64 *COLUM. L. REV.* 439 (1964); Pitofsky, *Beyond Nader: Consumer Protection and the Regulation of Advertising*, 90 *HARV. L. REV.* 661 (1977) [hereinafter cited as Pitofsky]; Note, *Developments in the Law—Deceptive Advertising*, 80 *HARV. L. REV.* 1005 (1967).

advertisements that fail to disclose material information, unsubstantiated advertising claims, and unfair advertisements that are not deceptive. In the conclusion, a checklist of factors based upon the governing legal principles and the decisional law is offered for advertisers and practitioners to consider when assessing the legality of particular advertising practices.

OVERVIEW OF BASIC PRINCIPLES

The fundamental source of Federal Trade Commission jurisdiction over advertising is section 5 of the Federal Trade Commission Act.² In relevant part, section 5 prohibits "unfair or deceptive acts or practices in or affecting commerce."³ While the terms "unfair or deceptive" are both broad and ambiguous, they are not defined in the FTC Act itself. Rather, the precise construction and interpretation of these terms has been left to the Commission and the courts.⁴ Later sections of this Article discuss particular types of advertising practices that have been held unfair or deceptive.⁵ Discussion of specific practices is accordingly deferred to those sections of the Article. For the moment, it is enough to note some of the general substantive rules that govern the law of advertising as regulated by the Federal Trade Commission.

First, as used in section 5 of the FTC Act, the term "unfair" act or practice overlaps and goes beyond the term "deceptive" act or practice. Thus, an advertisement that is not "deceptive" may nevertheless be held "unfair."⁶ As a practical matter, this distinction is ordinarily not significant, since most illegal advertising practices are treated as being false or misleading and, therefore, as being both unfair *and* deceptive.⁷ Nevertheless, the theoretical

2. 15 U.S.C. § 45 (1976 & Supp. IV 1980).

3. Specifically, section 5 provides: "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful." 15 U.S.C. § 45(a)(1) (Supp. IV 1980).

4. See *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 385 (1965). The *Colgate-Palmolive* case contains one of the most authoritative statements concerning the role of the courts and the Commission in construing section 5. According to the Court:

This statutory scheme necessarily gives the Commission an influential role in interpreting § 5 and in applying it to the facts of particular cases arising out of unprecedented situations. . . . Nevertheless, while informed judicial interpretation is dependent upon enlightenment gained from administrative experience, in the last analysis, the words "deceptive practices" set forth a legal standard and they must get their final meaning from judicial construction.

Id. at 385. See also *FTC v. R. F. Keppell & Bros., Inc.*, 291 U.S. 304, 310-12 (1934); *FTC v. Raladam Co.*, 283 U.S. 643, 648 (1931).

5. See notes 45-135 and accompanying text *infra*.

6. See KANWIT, *supra* note 1, §§ 4.03, .05, .06; Craswell, *The Identification of Unfair Acts and Practices by the Federal Trade Commission*, 1981 WIS. L. REV. 107; Pitofsky, *supra* note 1, at 680-87; Note, *Section 5 of the Federal Trade Commission Act—Unfairness to Consumers*, 1972 WIS. L. REV. 1071.

7. See, e.g., *In re Firestone Tire & Rubber Co.*, 81 F.T.C. 398, 427 (1972) (holding that it is both unfair and deceptive to make specific advertising claims affecting the safety of potentially dangerous products without prior reasonable data to substantiate the claims), *aff'd*, 481 F.2d 246 (6th Cir.), *cert. denied*, 414 U.S. 1112 (1973); *In re Arthur Murray Studio of Wash., Inc.*, 78

distinction between the two concepts should be kept clearly in mind. A later section of the Article examines the unfairness doctrine in some detail, including significant recent developments in the Commission's own interpretation of the doctrine.⁸

A second principle fundamental to the law of advertising is that in determining whether an advertisement is unfair or deceptive, it is necessary to look beyond the specific words and phrases used in the advertisement and to assess the overall impression conveyed to the consumer.⁹ Literal truth is *not* a defense if the advertising can be interpreted in a misleading way.¹⁰ Moreover, when an advertisement can be interpreted by the consumer in both a misleading and a truthful manner, it will be considered misleading.¹¹

An additional basic principle is that, when determining whether an advertisement is "deceptive," it is not necessary to show that anyone has actually been deceived.¹² Rather, the test is whether the advertisement has the *tendency or capacity to deceive*.¹³ In making this determination, the Commission is not required to take actual consumer testimony, although such testimony can be particularly probative. Instead, the Commission can rely upon its own reading and interpretation of the impact of the advertisement upon consumers.¹⁴

A closely related general principle is that an advertisement may violate section 5, even though it would not deceive or mislead an average consumer,

F.T.C. 401, 430 (1971) (holding both unfair and deceptive the practice of using trick advertisements, followed by high pressure sales techniques, to induce consumers into buying a service at exorbitant prices), *aff'd*, 458 F.2d 622 (5th Cir. 1972).

8. See notes 116-35 and accompanying text *infra*.

9. See, e.g., *Beneficial Corp. v. FTC*, 542 F.2d 611, 617 (3d Cir. 1976) ("advertising . . . must be judged by viewing it as a whole, without emphasizing isolated words or phrases apart from their context"), *cert. denied*, 430 U.S. 983 (1977); *J.B. Williams Co. v. FTC*, 381 F.2d 884, 889-90 (6th Cir. 1967) (Commission not bound by literal meaning of words); *Carter Prods., Inc. v. FTC*, 323 F.2d 523, 528 (5th Cir. 1963) (Commission may look to overall impact of entire advertisement). See also *FTC v. Sterling Drugs, Inc.*, 317 F.2d 669, 674 (2d Cir. 1963); *P. Lorillard Co. v. FTC*, 186 F.2d 52, 58 (4th Cir. 1950).

10. E.g., *Koch v. FTC*, 206 F.2d 311, 317 (6th Cir. 1953). See also cases cited in note 9 *supra*.

11. See, e.g., *Simeon Mgm't Corp. v. FTC*, 579 F.2d 1137, 1146 (9th Cir. 1978); *Country Tweeds, Inc. v. FTC*, 326 F.2d 144, 148 (2d Cir. 1964); *Murray Space Shoe Corp. v. FTC*, 304 F.2d 270, 272 (2d Cir. 1962); *In re Sears, Roebuck & Co.*, 95 F.T.C. 406, 511 (1980), *enforced sub nom.* *Sears, Roebuck & Co. v. FTC*, 676 F.2d 385 (9th Cir. 1982).

12. See, e.g., *Trans World Accounts, Inc. v. FTC*, 594 F.2d 212, 214 (9th Cir. 1979); *Resort Car Rental Sys., Inc. v. FTC*, 518 F.2d 962, 964 (9th Cir.), *cert. denied*, 423 U.S. 827 (1975); *Montgomery Ward & Co. v. FTC*, 379 F.2d 666, 670 (7th Cir. 1967); *FTC v. Sterling Drugs, Inc.*, 317 F.2d 669, 674 (2d Cir. 1963).

13. See, e.g., *Trans World Accounts, Inc. v. FTC*, 594 F.2d 212, 214 (9th Cir. 1979); *Simeon Mgm't Corp. v. FTC*, 579 F.2d 1137, 1146 n.11 (9th Cir. 1978); *Beneficial Corp. v. FTC*, 542 F.2d 611, 617 (3d Cir. 1976), *cert. denied*, 430 U.S. 983 (1977).

14. See, e.g., *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 391-92 (1965); *Simeon Mgm't Corp. v. FTC*, 579 F.2d 1137, 1146 n.11 (9th Cir. 1978); *Standard Oil Co. of Cal. v. FTC*, 577 F.2d 653, 659 (9th Cir. 1978); *Doherty, Clifford, Steers & Shenfield, Inc. v. FTC*, 392 F.2d 921, 925 (6th Cir. 1968); *Carter Prods., Inc. v. FTC*, 323 F.2d 523, 528 (5th Cir. 1963).

if it has the tendency or capacity to deceive a significant group of persons toward whom the advertisement is directed.¹⁵ This principle, sometimes referred to as the test of the "ignorant, the unthinking and the credulous,"¹⁶ is not without its limitations, however. For example, in *In re Universe Co.*,¹⁷ the Commission rejected a challenge to the legality of an advertising claim that a swimming aid would be "invisible" when worn. The Commission concluded that it would be "too far-fetched" to assume that the buying public would take the claim literally, rather than simply as meaning "inconspicuous." In so concluding, the Commission observed:

True, as has been reiterated many times, the Commission's responsibility is to prevent deception of the gullible and credulous, as well as the cautious and knowledgeable. This principle loses its validity, however, if it is applied uncritically or pushed to an absurd extreme. . . . A representation does not become "false and deceptive" merely because it will be unreasonably misunderstood by an insignificant and unrepresentative segment of the class of persons to whom the representation is addressed. If, however, advertising is aimed at a specially susceptible group of people (e.g., children), its truthfulness must be measured by the impact it will make on them, not on others to whom it is not primarily directed.¹⁸

Just as proof of actual deception is not an essential element in a section 5 advertising case,¹⁹ it is not necessary to prove an "intent to deceive."²⁰ The advertiser's good or bad faith in disseminating a false or misleading advertisement is irrelevant.²¹ Further, it is not even required that the advertiser know that the advertisement is possibly false or misleading.²² A recent case illustrating the outer limits of these governing principles is the Seventh Circuit's decision in *Porter & Dietsch, Inc. v. FTC*,²³ which involved false

15. See, e.g., *FTC v. Standard Educ. Soc'y*, 302 U.S. 112, 116 (1937); *FTC v. Sterling Drugs, Inc.*, 317 F.2d 669, 674 (2d Cir. 1963); *P. Lorillard Co. v. FTC*, 186 F.2d 52, 58 (4th Cir. 1950). See generally KANWIT, *supra* note 1, § 4.03; ROSDEN, *supra* note 1, § 10.02; Millstein, *The Federal Trade Commission and False Advertising*, 64 COLUM. L. REV. 439, 457-61 (1964); Pitofsky, *supra* note 1, at 675-76.

16. *Aronberg v. FTC*, 132 F.2d 165, 167 (7th Cir. 1942).

17. 63 F.T.C. 1282 (1963), *aff'd*, 337 F.2d 751 (9th Cir. 1964). See also *Standard Oil Co. of Cal. v. FTC*, 577 F.2d 653, 657 (9th Cir. 1978) (although the law protects "the ignorant, unthinking, and incredulous," an advertisement will not be given a patently absurd interpretation).

18. 63 F.T.C. at 1290 (citation omitted).

19. See note 12 and accompanying text *supra*.

20. See, e.g., *Beneficial Corp. v. FTC*, 542 F.2d 611, 617 (3d Cir. 1976), *cert. denied*, 430 U.S. 983 (1977); *Montgomery Ward & Co. v. FTC*, 379 F.2d 666, 670 (7th Cir. 1967); *FTC v. Sterling Drugs, Inc.*, 317 F.2d 669, 674 (2d Cir. 1963); *In re Sears, Roebuck & Co.*, 95 F.T.C. 406, 517 n.9 (1980), *enforced sub nom.* *Sears, Roebuck & Co. v. FTC*, 676 F.2d 385 (9th Cir. 1982).

21. See, e.g., *Doherty, Clifford, Steers & Shenfield, Inc. v. FTC*, 392 F.2d 921, 925 (6th Cir. 1968); *Feil v. FTC*, 285 F.2d 879, 896 (9th Cir. 1960); *Koch v. FTC*, 206 F.2d 311, 317 (6th Cir. 1953); *Ford Motor Co. v. FTC*, 120 F.2d 175, 181 (6th Cir.), *cert. denied*, 314 U.S. 668 (1941).

22. See, e.g., *Gimbel Bros., Inc. v. FTC*, 116 F.2d 578, 579 (2d Cir. 1941).

23. 605 F.2d 294 (7th Cir. 1979), *cert. denied*, 445 U.S. 950 (1980).

advertising claims concerning nonprescription weight reduction tablets. An FTC proceeding was brought not only against the manufacturer of the product and the advertising agency that prepared the advertisements, but also against a retailer who participated in the manufacturer's cooperative advertising program. The court noted that the retailer's only involvement with the advertising was its participation in the advertising program, and that there was no showing that it had any knowledge of the deficiencies in the ads.²⁴ The retailer was nevertheless held fully liable as an "advertiser."²⁵

Knowledge may become relevant, however, when the action is not against the manufacturing or retailing advertiser but against an advertising agency that prepared the advertisement in accordance with the instructions of the actual advertiser. For example, the Sixth Circuit's decision in *Doherty, Clifford, Steers & Shenfield, Inc. v. FTC*,²⁶ involved a section 5 proceeding against an advertising agency as well as a manufacturer for preparing and disseminating ads that misrepresented the effectiveness of a throat lozenge in treating sore throats. The advertisements had been created by the ad agency for the manufacturer in accordance with the information provided by the manufacturer. In upholding a Commission order against the ad agency as well as the manufacturer, the Sixth Circuit stated that for liability to attach in such a situation, the agency must "participate actively" in the deception and "must know or have reason to know of the falsity of the advertising."²⁷ The court concluded that, at the very least, the agency should have known of the deception involved in the case because the advertisements it prepared "went far beyond" the more modest claims appearing in the materials provided by the manufacturer.²⁸ Given the standard of "active participation" plus actual or constructive "knowledge" prescribed by the court, the agency presumably would not have been held liable had the advertisements it prepared gone no further than the substantiating materials provided by the manufacturer.

Once the Commission has determined that an advertisement is unfair or deceptive, it has extremely broad discretion to shape the relief needed to terminate the unlawful advertising practice and to prevent its recurrence.²⁹

24. *Id.* at 297.

25. *Id.* at 309.

26. 392 F.2d 921 (6th Cir. 1968).

27. *Id.* at 928.

28. *Id.* at 929. See also *Porter & Dietsch, Inc. v. FTC*, 605 F.2d 294, 309 (7th Cir. 1979) (general discussion of various ad agency liability cases), *cert. denied*, 445 U.S. 950 (1980); *Standard Oil Co. of Cal. v. FTC*, 577 F.2d 653, 660 (9th Cir. 1978) (ad agency held liable where, "given the degree of participation" by the ad agency in preparation of challenged ad, "it knew or should have known" that ad was misleading); *Carter Prods., Inc. v. FTC*, 323 F.2d 523, 534 (5th Cir. 1963) (ad agency held liable where it extensively participated in deception). See generally KANWIT, *supra* note 1, § 22.13.

29. See, e.g., *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 392 (1965) ("Commission has wide discretion in determining the type of order that is necessary to cope with unfair practices found"); *Simeon Mgm't Corp. v. FTC*, 579 F.2d 1137, 1147 (9th Cir. 1978) ("order [of Commission] will be upheld unless it has no reasonable relation to practices found to be unlawful"). See

The basic statutory source of the Commission's general remedial powers is section 5(b) of the FTC Act,³⁰ which empowers the Commission to issue "cease and desist" orders that prohibit companies from engaging in unfair or deceptive acts or practices.³¹ The expansive language of section 5(b) has been construed to support not only straightforward orders to cease engaging in specific unlawful practices³² but, in addition, more novel remedial provisions, such as orders requiring the affirmative disclosure of specified product information,³³ corrective advertising designed to cure the lingering effects of past advertising practices,³⁴ notices to past purchasers to counteract the

also *FTC v. National Lead Co.*, 352 U.S. 419, 428-29 (1957); *FTC v. Ruberoid Co.*, 343 U.S. 470, 473 (1952); *Jacob Siegel Co. v. FTC*, 327 U.S. 608, 611-13 (1946).

30. 15 U.S.C. § 45 (b) (Supp. IV 1980).

31. Note that the Supreme Court initially viewed the FTC's cease and desist powers under section 5 narrowly, as empowering the Commission only to order relief clearly of a "cease and desist" nature. *FTC v. Eastman Kodak Co.*, 274 U.S. 619, 623-24 (1927). The restrictive position taken in *Kodak* has, however, since been rejected by the Supreme Court. See *FTC v. Dean Foods Co.*, 384 U.S. 597, 606 n.4 (1966); *Pan American World Airways, Inc. v. United States*, 371 U.S. 296, 311-13 (1963). See also *Warner-Lambert Co. v. FTC*, 562 F.2d 749, 757 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 950 (1978).

32. See, e.g., *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374 (1965) (upholding Commission order prohibiting use of deceptive product performance demonstrations for any of company's products when company had repeatedly used deceptive demonstrations in television commercials); *FTC v. Standard Educ. Soc'y*, 302 U.S. 112 (1937) (upholding Commission order prohibiting use of deceptive claims as to "reduced" prices, "free" goods, and third-party product testimonials); *National Comm'n on Egg Nutrition v. FTC*, 570 F.2d 157 (7th Cir. 1977) (upholding, with minor modifications, Commission order prohibiting industry trade association from advertising that there was no scientific evidence of health risk associated with product, when issue was actually in scientific dispute), *cert. denied*, 439 U.S. 821 (1978); *ITT Continental Baking Co. v. FTC*, 532 F.2d 207 (2d Cir. 1976) (upholding Commission order prohibiting misrepresentations concerning growth properties of any of company's bread products). See also cases cited in note 45 *infra*.

33. See, e.g., *Porter & Dietsch, Inc. v. FTC*, 605 F.2d 294 (7th Cir. 1979) (upholding Commission order requiring affirmative disclosure of a health risk associated with product, if used by certain groups of consumers), *cert. denied*, 445 U.S. 950 (1980); *Simeon Mgm't Corp. v. FTC*, 579 F.2d 1137 (9th Cir. 1978) (upholding Commission order requiring affirmative disclosure of fact that a drug was not FDA-approved, when consumers would otherwise tend to assume from ads that drug was so approved); *J.B. Williams Co. v. FTC*, 381 F.2d 884 (6th Cir. 1967) (upholding Commission order requiring affirmative disclosure that most people suffering from particular symptoms stressed in company's ads do not suffer from problems that the company's product could treat); *Waltham Watch Co. v. FTC*, 318 F.2d 28 (7th Cir.) (upholding Commission order requiring affirmative disclosure that the company's products were not, as inferred in ads, manufactured by the same well-known manufacturer whose trademark it had acquired), *cert. denied*, 375 U.S. 944 (1963); *Ward Laboratories, Inc. v. FTC*, 276 F.2d 952 (2d Cir.) (upholding Commission order requiring affirmative disclosure that company's lotion for baldness was not effective in treating most cases of baldness), *cert. denied*, 364 U.S. 827 (1960).

34. See, e.g., *Warner-Lambert Co. v. FTC*, 562 F.2d 749 (D.C. Cir. 1977) (upholding Commission order requiring company to run "corrective advertisements" to counteract lingering effects in minds of consumers of over fifty years of false advertising claims that company's product could treat colds and sore throats), *cert. denied*, 435 U.S. 950 (1978). See also *In re Firestone Tire & Rubber Co.*, 81 F.T.C. 398 (1972) (Commission declined to order corrective advertising but asserted that such relief is within its remedial powers), *aff'd*, 481 F.2d 246 (6th

misimpressions created by past advertisements,³⁵ and substantiation of advertising claims by reasonable supporting data.³⁶

The Commission's arsenal of remedial powers was further expanded by amendments to the FTC Act in 1975³⁷ that expressly empower the Commission to seek "consumer redress" and "civil penalties" in the courts for violations of Commission Trade Regulation Rules³⁸ and cease and desist orders. New sections 19(a) and 19(b) were added to the Act,³⁹ authorizing the

Cir.), *cert. denied*, 414 U.S. 1112 (1973); *In re AMF, Inc.*, 95 F.T.C. 310 (1980) (consent order requiring manufacturer to produce and distribute public service corrective advertisements); *In re Ocean Spray Cranberries*, 80 F.T.C. 975 (1972) (consent order requiring corrective advertising); *In re ITT-Continental Baking Co.*, 79 F.T.C. 248 (1971) (same). *But see* National Comm'n on Egg Nutrition v. FTC, 570 F.2d 157 (7th Cir. 1977) (striking down corrective advertising provision when proven deception had not occurred long enough to have had lingering effect upon consumers), *cert. denied*, 439 U.S. 821 (1978). *See generally* KANWIT, *supra* note 1, § 22.11; Mann & Gurol, *An Objective Approach to Detecting and Correcting Deceptive Advertising*, 54 NOTRE DAME LAW. 73 (1978); Pitofsky, *supra* note 1, at 692-701.

35. *See, e.g., In re Travel King*, 86 F.T.C. 715 (1975) (requiring notification of past purchasers endangered by false advertising claims that company's service, "psychic surgery," was substitute for normal medical care). *See also In re Montgomery Ward & Co.*, 95 F.T.C. 265 (1980) (consent order requiring notification of past purchasers of safety hazard created by past advertising claims and of availability of repair and refund options).

36. *See, e.g., Jay Norris, Inc. v. FTC*, 598 F.2d 1244 (2d Cir.) (upholding, with minor modifications, Commission order requiring mail-order company to substantiate all safety or performance claims for any of its products with prior "competent and objective material available in written form"), *cert. denied*, 444 U.S. 980 (1979); *In re Sears, Roebuck & Co.*, 95 F.T.C. 406 (1980) (ordering Sears to substantiate performance claims for major home appliances with prior competent scientific test data), *appeal docketed* No. 80-7368 (9th Cir. 1981); *In re Firestone Tire & Rubber Co.*, 81 F.T.C. 398 (1972) (ordering company to substantiate safety-related advertising claims concerning its tires with prior competent scientific tests), *aff'd*, 481 F.2d 246 (6th Cir.), *cert. denied*, 414 U.S. 1112 (1973).

37. Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, Pub. L. No. 93-637, § 202, 88 Stat. 2193 (1975) (codified at 15 U.S.C. §§ 45, 57a, 57b (1976)).

38. 15 U.S.C. § 45 (m)(1)(a), 57b (1976) (originally enacted as Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, Pub. L. No. 93-637, § 205, 88 Stat. 2200 (1975). The amendment established the Commission's authority to promulgate and enforce FTC Trade Regulation Rules. 16 C.F.R. §§ 1.7-.20 (1981). An FTC Trade Regulation Rule specifically defines particular acts or practices as unfair or deceptive within the meaning of section 5. 16 C.F.R. §§ 400.1-460.24 (1981). These rules have the force and effect of law and, like individual cease and desist orders, are enforceable by actions for civil penalties or consumer redress.

Supplementing this rule-making authority is the Commission's issuance of Industry Guides. Unlike Trade Regulation Rules, these Guides are purely interpretive and do not constitute substantive rules of law. The Guides are, however, definite indicators of particular acts or practices that the Commission considers violative of section 5. *See, e.g., In re Gimbel Bros.*, 61 F.T.C. 1051, 1072-73 (1962).

For the text of current and pending FTC Trade Regulation Rules, see [1980] 4 TRADE REG. REP. (CCH) ¶¶ 38,000-.050. A number of these Rules affect various forms of advertising such as advertising of franchises, eyeglasses, vocational schools, antacids, foods, and protein supplements.

For the text of current FTC Industry Guides, see [1980] 4 TRADE REG. REP. (CCH) ¶¶ 39,001-.057. The Guides cover a number of diverse advertising practices such as bait advertising, deceptive advertising of guarantees, deceptive price advertising, and advertising endorsements.

39. 15 U.S.C. § 57b (a)-(b) (1976).

Commission to seek court ordered "consumer redress," such as rescission or reformation of contracts, refunds, damages, or public notification, where a company either: (1) violates a Trade Regulation Rule promulgated by the Commission, even though the company is ignorant of the Rule;⁴⁰ or (2) engages in an unfair or deceptive act or practice which a "reasonable man" would have "known" under the circumstances was "dishonest or fraudulent," and the Commission issues a final cease and desist order against the company.⁴¹ In addition, a new section 5(m) was added to the FTC Act,⁴² empowering the Commission to seek "civil penalties" in the courts where a company: (1) violates a Trade Regulation Rule promulgated by the Commission with "actual knowledge or knowledge fairly implied" that its conduct was "unfair or deceptive" and "prohibited" by the Rule;⁴³ or (2) engages in an act or practice already determined to be "unfair or deceptive" in a final Commission cease and desist order against that company, or anyone else, with "actual knowledge" that such act or practice is "unfair or deceptive and . . . unlawful."⁴⁴

40. 15 U.S.C. § 57b (a)(1) (1976). Note that "knowledge" is not an element of a consumer redress action brought for violation of a Trade Regulation Rule; only the fact of the violation need be shown. In addition, an action may be brought in federal or state court for consumer redress involving a Rule violation without first bringing a separate administrative proceeding. See generally KANWIT, *supra* note 1, § 21; Kinter & Smith, *The Emergence of the Federal Trade Commission as a Formidable Consumer Protection Agency*, 26 MERCER L. REV. 651 (1975).

41. 15 U.S.C. § 57b (a)(2) (1976). Unlike an action based upon violation of a Trade Regulation Rule, *see* note 40 *supra*, a consumer redress action based upon practices prohibited by a cease and desist order involves an initial administrative proceeding before the Federal Trade Commission. Following that proceeding and the issuance of the Commission's final cease and desist order, a subsequent action is brought in the federal or state courts for consumer redress based upon the practices found to be unlawful in the administrative proceeding. See, e.g., *FTC v. Glenn W. Turner Enterprises, Inc.*, 446 F. Supp. 1113 (M.D. Fla. 1978).

A special standard applies in the court action—proof that a "reasonable man" would have "known" that the practices were "dishonest or fraudulent." The meaning of these words has not yet been hammered out in the courts, although the terms presumably mean something more than mere "deception" and something less than "criminal fraud." See generally KANWIT, *supra* note 1, § 21.03; Kintner & Smith, *The Emergence of the Federal Trade Commission as a Formidable Consumer Protection Agency*, 26 MERCER L. REV. 651 (1975).

42. 15 U.S.C. § 45(m) (1976).

43. *Id.* § 45(m)(1)(A). Actual or constructive "knowledge" is an element here, whereas knowledge is not an element in a section 19 action, *id.* § 57b, for consumer redress based upon violation of a Trade Regulation Rule. See note 40 *supra*.

44. 15 U.S.C. § 45(m)(1)(B) (1976). The "knowledge" requirement is more demanding here than that for a Rule violation. See note 43 *supra*. Actual knowledge that the practice is "unfair or deceptive" and "unlawful" must be shown. If this knowledge test is met, however, an action for civil penalties under this subsection can be based upon conduct of the type prohibited by an FTC order issued against an *altogether different company*. If the company is itself under an order and violates that order, the Commission can then alternatively bring an action for civil penalties in a district court under a different provision of the FTC Act, 15 U.S.C. § 45(1) (1976). This latter provision does not contain a "knowledge" requirement, since it is limited to violations of orders directed against the violators themselves. *Id.* See generally KANWIT, *supra* note 1, §§ 10.06-.09; Bickert, *Civil Penalties Under Section 5(m) of the Federal Trade Commission Act*, 44 U. CHI. L. REV. 761 (1977).

Particularly since the enactment of the 1975 amendments to the FTC Act, it is no exaggeration to say that the Commission's remedial powers in advertising cases are extremely expansive. It is, therefore, very important that advertisers and practitioners alike familiarize themselves with the general substantive rules that govern the FTC law of advertising, so as not to become unwitting participants in potentially costly FTC proceedings. Accordingly, the next section of this Article discusses some of the specific advertising practices that have been held unlawful under section 5 of the Federal Trade Commission Act.

SPECIFIC PROBLEM AREAS

Directly False or Misleading Advertisements

Section 5 of the FTC Act is clearly violated when a company disseminates advertisements which are, by their very terms, false or misleading.⁴⁵ This rule of illegality applies even if the company is unaware that the ads are deceptive⁴⁶ and does not actually intend to deceive.⁴⁷ Moreover, proof of actual deception is not required if the advertisements have the tendency or capacity to deceive a significant group of persons towards whom the ads are directed.⁴⁸ Finally, the false or misleading representations need not be "verbal;" nonverbal misrepresentations, such as pictures or demonstrations, can be equally objectionable.⁴⁹

A leading—and extreme—case illustrative of these principles is the United States Supreme Court's decision in *FTC v. Colgate-Palmolive Co.*⁵⁰ This

45. See, e.g., *FTC v. Standard Educ. Soc'y*, 302 U.S. 112 (1937) (false claims concerning "reduced" prices, "free" goods, and third party product testimonials); *FTC v. Algoma Lumber Co.*, 291 U.S. 67 (1934) (false claims as to the nature of the product); *FTC v. Royal Milling Co.*, 288 U.S. 212 (1933) (false claims as to the advertisers' identities that affected purchase decision); *Porter & Dietsch, Inc. v. FTC*, 605 F.2d 294 (7th Cir. 1979) (false claims concerning effectiveness of weight reduction tablets), *cert. denied*, 445 U.S. 950 (1980); *Standard Oil Co. of Cal. v. FTC*, 577 F.2d 653 (9th Cir. 1978) (exaggerated claims concerning product's ability to reduce air pollutants in automobile exhaust); *National Comm'n on Egg Nutrition v. FTC*, 570 F.2d 157 (7th Cir. 1977) (false claims by industry trade association that there was "no" scientific evidence of health hazard associated with a product, when issue was actually in scientific dispute), *cert. denied*, 439 U.S. 821 (1978); *Warner-Lambert Co. v. FTC*, 562 F.2d 749 (7th Cir. 1977) (false claims that company's mouthwash could prevent and cure colds and sore throats), *cert. denied*, 435 U.S. 950 (1978); *Tashof v. FTC*, 437 F.2d 707 (D.C. Cir. 1970) (deceptive use of "bait and switch" practices, false advertising of "easy credit" and false advertising of "sale" prices). See also *Montgomery Ward & Co. v. FTC*, 379 F.2d 666 (7th Cir. 1967) (false claims that products were "unconditionally guaranteed" when guarantees enclosed with the products were actually conditional).

46. See note 22 and accompanying text *supra*.

47. See notes 20-21 and accompanying text *supra*.

48. See notes 12-18 and accompanying text *supra*.

49. See, e.g., *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374 (1965) (deceptive demonstrations in television commercials); *Carter Prods., Inc. v. FTC*, 323 F.2d 523 (5th Cir. 1963) (same). See generally Note, "Extrinsic Misrepresentations" in Advertising Under Section 5(a) of the Federal Trade Commission Act, 114 U. PA. L. REV. 725 (1966).

50. 380 U.S. 374 (1965).

case involved a section 5 proceeding against a manufacturer and its advertising agency⁵¹ for use of a deceptive television commercial. The commercial showed a supposed visual demonstration that the company's shaving cream would "soften" even sandpaper. Unknown to the viewer, a mock-up consisting of a layer of plexiglas coated with loose sand was used instead of sandpaper.

In upholding the Commission's determination that the commercial was deceptive, the Supreme Court first noted that it was not concerned with whether the product would actually soften sandpaper as asserted.⁵² The Court concluded that the "undisclosed" use of a mock-up to convey the "false impression" that the consumer is seeing an "actual test, experiment or demonstration" is, in itself, deceptive.⁵³ In so holding, the Court stressed the Commission's "influential role" in prescribing what is, or is not, a deceptive practice: "This Court has frequently stated that the Commission's judgment is to be given great weight by reviewing courts. This admonition is especially true with respect to allegedly deceptive advertising since the finding of a §5 violation in this field rests so heavily on inference and pragmatic judgment."⁵⁴ The Court additionally emphasized the Commission's authority to draw its own inferences as to the "tendency" of a verbal or nonverbal advertising claim to "mislead," without resort to actual consumer testimony or other proof of actual consumer deception:

Nor was it necessary for the Commission to conduct a survey of the viewing public before it could determine that the commercials had a tendency to mislead, for when the Commission finds deception it is also authorized, within the bounds of reason, to infer that the deception will constitute a material factor in a purchaser's decision to buy.⁵⁵

The Commission's determination that the nonverbal representation at issue in *Colgate-Palmolive* was deceptive was accordingly upheld, notwithstanding the total absence of any concrete, as opposed to conjectural, evidence that any consumer had actually been deceived or misled.

A further illustration of directly false or misleading advertisements is provided by the Commission's recent decision in *In re Jay Norris Corp.*⁵⁶ A mail order retailer of consumer products made deceptive advertising claims in mail-order catalogs and newspapers that distorted performance and safety characteristics of several of its products. For example, advertisements for a propane flame gun claimed that the device would "whip" through the "thickest" ice in only "seconds," when testimony by consumers and experts established that consumers would need the patience of Job to actually melt

51. For a discussion of retailer and advertising agency liability, see notes 23-28 and accompanying text *supra*.

52. 380 U.S. at 385-86.

53. *Id.* at 386-90.

54. *Id.* at 385 (citations omitted).

55. *Id.* at 391-92.

56. 91 F.T.C. 751 (1978), *aff'd*, 598 F.2d 1244 (2d Cir.), *cert. denied*, 444 U.S. 980 (1979).

ice with the gun. Similarly, the company's advertisements for a roach powder claimed that the product was perfectly "safe" to use, when the product could actually injure consumers if not properly used. Given the magnitude and severity of the advertising violations involved in the case, the Commission issued an order requiring the company to substantiate the validity of "all" safety or performance claims for "any" of its mail-order products by "competent and objective material available in written form."⁵⁷ This concededly drastic relief was upheld on appeal to the Second Circuit against charges of overbreadth, vagueness, and the possible chilling of first amendment freedom of speech.⁵⁸

Impliedly False or Misleading Advertisements

An advertisement can mislead by unspoken implication as well as by directly false or misleading representations. Thus, an advertisement can be "unfair and deceptive" within the meaning of section 5 of the FTC Act even though every statement contained in the ad is literally true.⁵⁹ This result commonly occurs when only part of the truth is told, while unfavorable information that would discredit or contradict the affirmative statements is withheld. Similarly, advertisements may deceive by means of unspoken innuendo, if the consequence is a tendency for consumers to be misled.

A helpful illustration of advertisements that deceive by telling only part of the truth is the Fourth Circuit's oft-cited decision in *P. Lorillard Co. v. FTC*.⁶⁰ Lorillard advertisements claimed that a Reader's Digest study had determined that "Old Gold" cigarettes were lower than other brands in tar and nicotine content. It was correct that a study published in the Reader's Digest contained a table that did, indeed, show Old Gold lowest in these product attributes. Lorillard did not, however, disclose that the study itself had concluded that the difference was so marginal as to be insignificant, thereby deceiving consumers into the erroneous impression that the study had found the company's cigarettes to be significantly better than other brands in terms of tar and nicotine content. The Fourth Circuit upheld the Commission's determination that the ads violated section 5, reasoning that: "To tell less than the whole truth is a well known method of deception; and

57. 91 F.T.C. at 851-58.

58. *Jay Norris, Inc. v. FTC*, 598 F.2d 1244 (2d Cir.), cert. denied, 444 U.S. 980 (1979). For a survey of other advertising cases involving first amendment issues, see note 93 *infra*.

59. As stated by the Second Circuit in *FTC v. Sterling Drugs, Inc.*, 317 F.2d 669 (2d Cir. 1963):

[W]e have increasingly come to recognize that "Advertisements as a whole may be completely misleading although every sentence separately considered is literally true. This may be because things are omitted that should be said, or because advertisements are composed or purposefully printed in such a way as to mislead."

Id. at 675 (citation omitted).

60. 186 F.2d 52 (4th Cir. 1950).

he who deceives by resorting to such method cannot excuse the deception by relying upon the truthfulness *per se* of the partial truth by which it has been accomplished."⁶¹

That advertisements may deceive by "innuendo" as well as by partial truths is illustrated in the Sixth Circuit's decision in *J.B. Williams Co. v. FTC*.⁶² This case involved television commercials that claimed that people who often feel tired and run down may be suffering from "iron poor blood," and that the company's product would make them feel stronger. The overall implication was that most people suffering from tiredness and loss of strength would feel better if they took the product. In actuality, most people suffering from these symptoms have medical problems other than the iron deficiency anemia that the product could help alleviate. In affirming the Commission's holding that the commercials violated section 5, the court reasoned that by creating a misleading impression that certain people would benefit from the product, when this was not in fact true, the commercials had a tendency to deceive.⁶³

An extreme example of advertisements that deceive by innuendo is the Ninth Circuit's recent decision in *Simeon Management Corp. v. FTC*.⁶⁴ This case concerned advertisements for a weight loss program described as being "safe and effective." The ads did not disclose that the program entailed use of a drug that had not been approved by the Food and Drug Administration (FDA) for use in weight reduction. Neither the program nor the drug were shown to be unsafe or ineffective; in fact, the company offered evidence to support the safety and efficacy of the drug. The Ninth Circuit nevertheless concluded that the ads were deceptive, reasoning that since consumers assume that drugs are FDA regulated as to safety and efficacy, the affirmative references in the advertisements to safety and efficacy tended to mislead consumers to the erroneous belief that the program, including the drug, had been FDA approved.⁶⁵ In so holding, the court looked far beyond the contents of the advertisement itself and considered factors independent of the advertisement—consumer expectations as to FDA drug regulation—in finding the advertisements to be impliedly deceptive.⁶⁶

61. *Id.* at 58.

62. 381 F.2d 884 (6th Cir. 1967).

63. *Id.* at 889-90.

64. 579 F.2d 1137 (9th Cir. 1978).

65. *Id.* at 1145-46.

66. *Id.* at 1146. See also *Porter & Dietsch, Inc. v. FTC*, 605 F.2d 294 (7th Cir. 1979) (consumer testimonials for weight loss product implied that consumers could expect substantial weight loss if they used the product, when most consumers would not achieve significant weight losses); *Waltham Watch Co. v. FTC*, 318 F.2d 28 (7th Cir.) (company acquired trademark of a well-known domestic manufacturer of clocks and used mark on imported, lower-grade clocks, thereby falsely inferring that imported clocks were high quality clocks produced by the domestic manufacturer), *cert. denied*, 375 U.S. 944 (1963); *Ward Labs., Inc. v. FTC*, 276 F.2d 952 (2d Cir.) (company advertised its product as being able to treat baldness caused by bacteria, inferring that most baldness is due to this problem, when product was actually ineffective in treating most common causes of baldness), *cert. denied*, 364 U.S. 827 (1960); *General Motors*

Material Non-Disclosure

One of the more controversial doctrines to evolve under section 5 is the "material non-disclosure" doctrine, whereby an advertisement may be deemed unfair or deceptive because of its failure to disclose material information to consumers.⁶⁷ As discussed more fully below, the term "material information" is not a concise concept. Rather, it is an umbrella phrase used to cover a diverse range of fact situations, so that an all-encompassing definition of the term is at best meaningless and at worst misleading. No doubt much of the controversy surrounding the doctrine is due to the absence of a clear definition of precisely what is "material" matter, subject to the requirement of affirmative disclosure in advertisements.

Nevertheless, a close examination of case law reveals that several major components of materiality have crystallized. In particular, most of the cases to date that have applied the material non-disclosure doctrine to advertising have used the doctrine specifically as an alternative label for advertising practices considered false or misleading due to deceptive half-truths or misleading innuendos. The *Lorillard*, *J.B. Williams*, and *Simeon Management* decisions are illustrative of the use of the materiality concept as a logical strategy for finding an advertisement impliedly false or misleading. *Lorillard*, for example, deceived consumers by stating that a survey rated its brand of cigarettes as the lowest in tar and nicotine content, while failing to disclose the survey's conclusion that the difference was so marginal as to be insignificant.⁶⁸ Similarly, *J.B. Williams* deceived consumers by implying that many people would benefit from use of its product, while failing to disclose that only a small percentage of users would actually benefit.⁶⁹ Finally, *Simeon Management* deceived consumers by inferring the existence of an FDA approval for its product and service, without disclosing that such an approval had not actually been attained.⁷⁰

In each of these situations, express or implied claims in advertisements were rendered false, or at the very least misleading, by the non-disclosure of information known to the advertiser. The information withheld was thus material in the sense that absent its disclosure, the advertisements became

Corp. v. FTC, 114 F.2d 33 (2d Cir. 1940) (company advertised credit terms for auto installment contracts, showing financing charges as "6%" of unpaid balance, thereby misleading public into believing 6% was the "simple" interest figure, when in reality the simple interest rate was 11.5%), *cert. denied*, 312 U.S. 682 (1941).

67. See *KANWIT*, *supra* note 1, § 4.03; *ROSDEN*, *supra* note 1, § 18.04[1]. The material non-disclosure doctrine is not limited to advertising practices only, but can arise in nonadvertising contexts as well. See, e.g., cases cited in note 87 *infra*.

68. *P. Lorillard Co. v. FTC*, 186 F.2d 52, 58 (4th Cir. 1950). See also notes 60-61 and accompanying text *supra*.

69. *J.B. Williams Co., Inc. v. FTC*, 381 F.2d 884, 890 (6th Cir. 1967). See also notes 62-63 and accompanying text *supra*.

70. *Simeon Mgm't Corp. v. FTC*, 579 F.2d 1137, 1145-46 (9th Cir. 1978). See also notes 64-66 and accompanying text *supra*.

deceptive. From these and other comparable decisions,⁷¹ a major facet of the material non-disclosure doctrine can be identified. Information is "material" within the meaning of the material non-disclosure doctrine, and therefore subject to the requirement of affirmative disclosure, if it tends to undercut or discredit partial truths contained in an advertisement or would correct or counteract misleading innuendos implicit in an advertisement.

A review of the case law reveals that the material non-disclosure doctrine has been extended still further to require the affirmative disclosure of nonobvious health or safety risks associated with the use of a product or service. The rationale for requiring such disclosures is that consumers "assume that products put into commerce are safe under normal use" and, hence, that nondisclosure of product health and safety problems has the effect of deceiving consumers into purchasing something that they might not otherwise have purchased.⁷² In accordance with this rationale, nonobvious health and safety hazards must be disclosed not only when safety-related claims are contained in the advertisements that render the ads impliedly false, but also when no safety claims are made at all.⁷³ In either situation, failure to disclose the hazard is considered inherently unfair and deceptive.

The leading safety disclosure case is *In re Stupell Enterprises*,⁷⁴ in which the Commission outlined several of the leading principles that govern the material non-disclosure doctrine as applied to health and safety factors. The case involved a children's toy, consisting of a pair of goggles to which a punching ball was attached by a rubber string, that could cause severe eye damage if it malfunctioned. The toy was packaged in such a way that the hazard was not apparent, and no disclosure of the risk was made in either the advertising or the package label. The Commission held that non-disclosure of the safety risk constituted an unfair and deceptive practice.⁷⁵ The Commission added the significant caveat, however, that advertisers need not disclose "all conceivable hazards which might result" from use of their products.⁷⁶ Rather, advertisers are simply required to disclose "nonobvious" health and safety hazards that may arise,⁷⁷ with the precise nature of this obligation varying from case to case.⁷⁸ Factors to be considered in determining

71. See cases cited in note 33 *supra*.

72. See, e.g., *In re Firestone Tire & Rubber Co.*, 81 F.T.C. 398, 456 (1972), *aff'd*, 481 F.2d 246 (6th Cir.), *cert. denied*, 414 U.S. 1112 (1973); *In re Stupell Enterprises*, 67 F.T.C. 173, 187-88 (1965).

73. See, e.g., *Porter & Dietsch, Inc. v. FTC*, 605 F.2d 294, 303-04 (7th Cir. 1979), *cert. denied*, 445 U.S. 950 (1980); *In re Firestone Tire & Rubber Co.*, 81 F.T.C. 398, 456 (1972), *aff'd*, 481 F.2d 246 (6th Cir.), *cert. denied*, 414 U.S. 1112 (1973).

74. 67 F.T.C. 173 (1965).

75. *Id.* at 187-88.

76. *Id.*

77. Nonobvious dangers are those that are not readily observable and are not a matter of general public knowledge. For example, advertisers need not warn of the effects of drinking alcohol, since these effects are generally known. See I R. CALLMAN, *THE LAW OF UNFAIR COMPETITION, TRADEMARKS AND MONOPOLIES* 652 (L. Altman 4th rev. ed. 1981).

78. *In re Stupell Enterprises*, 67 F.T.C. 173, 187 (1965).

whether disclosure is necessary include: the extent and severity of the hazard; the likelihood that injury may occur; the sophistication of the audience toward whom the advertisement is directed or likely to be influenced by the advertisement; the alternatives to advertising disclosure, such as conspicuous disclosures on product labels; and the likelihood that consumers will detect the hazard on their own prior to making their purchase.⁷⁹ Depending upon how these and other possibly relevant considerations are resolved, latent health and safety hazards in a product may be deemed "material" information that must be affirmatively disclosed.

Recent complaints issued by the Federal Trade Commission reflect still a further extension of the material non-disclosure doctrine to encompass product defects which, while economically costly to the consumer, do not create actual health or safety hazards. Thus, complaints have issued during the past two years alleging that it is "unfair or deceptive" to fail to disclose nonobvious defects in heat pumps necessitating expensive repairs,⁸⁰ nonobvious defects in automobile bumpers causing them to rust out prematurely,⁸¹ and nonobvious defects in automobile engines or transmissions requiring costly repairs.⁸² It is impossible to derive definitive conclusions from these complaints, since they either are still in litigation or were issued in conjunction with negotiated consent orders. Thus, the theoretical underpinnings of the complaints may ultimately be rejected or modified by the Commission or the courts. As the complaints currently stand, however, they reflect two altogether different theoretical approaches to the product defects issue.

The first such approach is merely a logical application of the deception theory developed in *In re Stupell* and other litigated product safety cases. According to this approach, consumers expect products to be free of major defects, unless they have been specifically informed otherwise or the defects are evident. If a company marketing a product is aware of a significant and nonobvious defect in its product and fails to disclose it, the company unfairly and deceptively exploits the consumer's normal expectations.⁸³ The net result is that the consumer is deceived into purchasing a product that he might not otherwise have purchased.⁸⁴

79. *Id.* at 187-88.

80. *In re Fedders Corp.*, 93 F.T.C. 949 (1979).

81. *In re Chrysler Corp.*, 96 F.T.C. 134 (1980).

82. *In re Ford Motor Co.*, 96 F.T.C. 362 (1980) (consent order); *In re Volkswagen of America, Inc.*, FTC Dkt. 9154 (complaint issued April 1, 1981) (case still in litigation); *In re General Motors Corp.*, FTC Dkt. 9145 (complaint issued Aug. 7, 1980) (case still in litigation).

83. *Cf. In re Stupell Enterprises*, 67 F.T.C. 173, 187-88 (1965) (nondisclosure of product safety risk deceptively and unfairly exploits consumer's assumption that product marketed with no apparent restrictions is safe for particular use intended). See notes 72-79 and accompanying text *supra*.

84. See, e.g., *In re Fedders Corp.*, 93 F.T.C. 949 (1979) (consent complaint alleged that company unfairly or deceptively failed to disclose a known and potentially costly latent product defect when disclosure would probably have affected consumer's purchase decision).

This first line of reasoning assumes, however, that the company knew of the defect when it made the sales, thereby deceiving "prospective" purchasers. Some of the product defect complaints have gone a major step further, and have alleged that it is unfair or deceptive to fail to notify "past" purchasers of a major nonobvious product defect once the defect comes to the company's attention.⁸⁵ The rationale for this retrospective disclosure requirement is that past purchasers will otherwise be "unfairly" or "deceptively" prevented from taking precautionary measures needed to minimize their economic losses.⁸⁶ Obviously, these cases take us well beyond the law of advertising *per se* and are more akin to cases applying the material non-disclosure doctrine in contexts other than advertising.⁸⁷ It remains to be seen whether the Commission will actually adopt this far-reaching retroactive disclosure requirement, adopt the more limited requirement that prospective purchasers be informed of known latent defects, or reject both theories. However, since cases involving these issues are currently in litigation before the Commission,⁸⁸ further needed guidance can be expected in the near future.

The question of whether the material non-disclosure doctrine should be extended to include latent defects that are not safety-related is part of a broader debate as to how far the doctrine should be expanded. Some commentators would expand the doctrine to include much more than safety hazards or product defects, and would require affirmative disclosure in advertisements of *any* information needed by the consumer to make an informed purchase decision. Thus, it has been argued that all information

85. See *In re Chrysler Corp.*, 96 F.T.C. 134 (1980) (consent complaint alleged that company unfairly or deceptively failed to disclose a potentially costly product defect to past purchasers once defect became known, when disclosure would have enabled the purchasers to take necessary corrective action and avoid economic injury). See also *In re Ford Motor Co.*, 96 F.T.C. 362 (1980) (consent complaint); *In re Volkswagen of America, Inc.*, FTC Dkt. 9154 (complaint issued April 1, 1981) (case still in litigation); *In re General Motors Corp.*, FTC Dkt. 9145 (complaint issued Aug. 7, 1980) (case still in litigation).

86. See note 85 *supra*.

87. See, e.g., *Tashof v. FTC*, 437 F.2d 707 (D.C. Cir. 1970) (upholding Commission determination that it was unfair and deceptive for company to use confusing credit sales contracts with indigent consumers that did not disclose key credit terms in a way that they could comprehend); *In re Genesco, Inc.*, 89 F.T.C. 451 (1977) (holding unfair and deceptive company's practice of writing off consumer credit balances to its own account without first disclosing the existence of the balances to the consumers affected); *In re Beneficial Corp.*, 86 F.T.C. 119 (1975) (holding that it was unfair and deceptive for a finance company that also conducted a tax preparation service to fail to disclose that confidential information obtained from users of the tax service would be used to solicit loan customers), *rev'd in part on other grounds*, 542 F.2d 611 (3d Cir. 1976), *cert. denied*, 430 U.S. 983 (1977); *In re All State Indus. of N.C., Inc.*, 89 F.T.C. 451 (1977) (holding that it was unfair and deceptive for a company to fail to disclose that its consumer sales contracts would be negotiated to a finance company, thereby cutting off consumer defenses under the holder-in-due-course doctrine).

88. See cases currently in litigation cited in note 82 *supra*.

which "could affect the tendency to buy or not to buy,"⁸⁹ or which "the consumer needs to make an 'informed' choice,"⁹⁰ should be disclosed. Other commentators, however, view the doctrine more restrictively, and would limit its application to only those situations actually hammered out in prior litigation. Proponents of this more restrictive position argue that "the FTC has no power to order full disclosure in advertising,"⁹¹ and that the scope of the Commission's powers is limited to preventing deceptive and misleading statements in advertisements or warning against the possible consequences arising from use of a product.⁹² Close scrutiny of each of these positions indicates that neither, standing alone, is persuasive.

From the standpoint of practicality, the latter position seems the more persuasive of the two views. If, as the expansionist view suggests, advertisements should contain literally everything that the consumer requires to make an informed purchase decision, consumers will then find themselves bombarded by a proliferation of miscellaneous product information. Advertisements will look increasingly like actual purchase contracts rather than mere promotional messages. The result will likely be consumer confusion instead of consumer enlightenment. An additional concern is that by increasing the cost of advertising, an overly demanding disclosure requirement will possibly discourage the use of many forms of advertising, thereby chilling the dissemination of truthful product information and violating first amendment rights.⁹³ Even assuming that such a chilling effect does not result, significant product information may, at the least, become clouded in a mist of miscellaneous purchase information of far less significance.

89. E. KINTNER, A PRIMER ON THE LAW OF DECEPTIVE PRACTICES 107 (2d ed. 1978). Kintner argues:

Generally speaking, an advertisement should set forth whatever the purchaser would normally want to know about the nature and use of the product. If certain information could affect the tendency to buy or not to buy, then it is a safe bet that such information should be disclosed in advertising.

Id.

90. Morse, *A Consumer's View of the FTC Regulation of Advertising*, 17 U. KAN. L. REV. 639 (1969). Morse argues that the "standard requires the seller not only to be truthful, but to empathize with the consumer by showing all the information about the product or service which the consumer needs to make an 'informed' choice." *Id.* at 640.

91. Anderson & Winer, *Corrective Advertising: The FTC's New Formula for Effective Relief*, 50 TEX. L. REV. 312, 320 (1972).

92. Lemke, *Souped up Affirmative Disclosure Orders of the Federal Trade Commission*, 4 U. MICH. J.L. REF. 180, 188 (1970). See also ROSDEN, *supra* note 1, §§ 18.04[1], [4].

93. The Supreme Court has specifically held that the constitutional safeguards of the first amendment extend to advertising and other forms of commercial speech. See, e.g., *Virginia Bd. of Pharm. v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976); *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977); *Linmark Ass'n v. Willingboro*, 431 U.S. 85 (1977). The Court has made it clear, however, that the first amendment does not preclude federal or state action designed to prevent advertisements from being false, misleading, or otherwise deceptive. See, e.g., *Virginia Bd. of Pharm. v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. at 771-72; *Bates v. State Bar of Ariz.*, 433 U.S. at 383. See generally KANWIT, *supra* note 1, §§ 22.07, .10;

Thus, it would seem that the expansionist viewpoint goes too far. This is not to say, however, that the opposite position is itself blemish free. Those critics who would limit the disclosure requirement only to those situations already hammered out in litigation are, in essence, taking a position that is inconsistent with the history of section 5. When Congress enacted section 5 with its broad prohibition of "unfair" or "deceptive" acts or practices, it gave far-reaching discretion to the Commission to interpret these terms as evolving concepts. Specifically, "the proscriptions . . . are flexible, 'to be defined with particularity by the myriad of cases from the field of business.'"⁹⁴ It would be a serious error to completely tie the Commission's hands in a significant area of evolving section 5 law—the area of material non-disclosure. For the protection of consumers and competing advertisers alike, the Commission should be able to expand the doctrine of material non-disclosure as required by new and previously unforeseen fact situations.

What, then, is a "material" fact within the meaning of the material non-disclosure doctrine as applied to advertisements in particular? The safest answer is that the definition of materiality is still evolving, and will continue to evolve as different fact situations confront the Commission. Thus, a precise definition that would encompass all possible fact situations cannot be given. Nevertheless, at least some components of the definition have crystallized, suggesting that information may be material and require affirmative disclosure in advertisements if: (1) the information undercuts or discredits partial truths contained in an advertisement; (2) the information would correct or counteract misleading innuendos contained in an advertisement; (3) the information concerns latent product health or safety hazards; or (4) possibly, the information concerns nonobvious and significant product defects, even though not safety-related.

Pitofsky, *supra* note 1, at 672-73; Reich, *Preventing Deception in Commercial Speech*, 54 N.Y.U. L. REV. 775 (1979).

For examples of FTC advertising cases in which first amendment defenses have been raised but rejected, see *Porter & Dietsch, Inc. v. FTC*, 605 F.2d 294 (7th Cir. 1979) (rejecting first amendment challenge to a product safety "affirmative disclosure" order), *cert. denied*, 445 U.S. 950 (1980); *Jay Norris, Inc., v. FTC*, 598 F.2d 1244 (2d Cir.) (rejecting first amendment challenge to an "ad substantiation" order), *cert. denied*, 444 U.S. 980 (1979); *Warner-Lambert Co. v. FTC*, 562 F.2d 749 (7th Cir. 1977) (rejecting first amendment challenge to a "corrective advertising" order), *cert. denied*, 435 U.S. 950 (1978); *In re Sears, Roebuck & Co.*, 95 F.T.C. 406 (1980) (rejecting first amendment challenge to an "ad substantiation" order), *enforced sub nom.* *Sears, Roebuck & Co. v. FTC*, 676 F.2d 385 (9th Cir. 1982).

For examples in which first amendment defense arguments have prevailed on appeal of particularly burdensome FTC orders, see *Standard Oil Co. of Calif. v. FTC*, 577 F.2d 653 (9th Cir. 1978) (order covered literally thousands of products, even though only a few advertisements and products were involved in proven law violations); *Beneficial Corp. v. FTC*, 542 F.2d 611 (3d Cir. 1976) (order flatly prohibited use of an advertising slogan, where Commission had not shown that qualifying language would not remove the deception inherent in the slogan).

94. *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 385 (1965). See also *FTC v. R.F. Keppel & Bro.*, 291 U.S. 304, 310-12 (1934). But see *Ford Motor Co. v. FTC*, 654 F.2d 599 (9th Cir. 1981) (holding that when an FTC adjudication had widespread application, the FTC exceeded its authority by proceeding by adjudication rather than by rule-making). See generally KANWIT, *supra* note 1, § 3.03.

Unsubstantiated Advertising Claims

A doctrine often confused with the "material non-disclosure" doctrine, but conceptually altogether different, is the doctrine of "ad substantiation." Certainly one of the most controversial developments in section 5 case law,⁹⁵ this doctrine mandates that affirmative product claims in advertisements must be supported by reasonable substantiating data.⁹⁶ Moreover, the advertiser must possess and rely upon this data before making the claims. Therefore, it is no defense that the claims are proven to be true after the fact.⁹⁷

95. See generally KANWIT, *supra* note 1, § 35.05[4].

96. See, e.g., *In re Sears, Roebuck & Co.*, 95 F.T.C. 406 (1980) (claims that dishwasher did not require pre-rinsing or scraping of dishes lacked prior reasonable basis), *appeal docketed, enforced sub nom. Sears, Roebuck & Co. v. FTC*, 676 F.2d 385 (9th Cir. 1982); *In re Fedders Corp.*, 85 F.T.C. 38 (1975) (claims that company's air conditioners had unique characteristics not possessed by competing air conditioners lacked prior reasonable supporting data), *aff'd*, 529 F.2d 1398 (2d Cir.), *cert. denied*, 429 U.S. 818 (1976); *In re Crown Cent. Petroleum Corp.*, 84 F.T.C. 1493 (1974) (claims that gasoline additive would reduce air pollutants lacked a reasonable basis, since company had not conducted prior scientific tests, and available evidence indicated that claims greatly exaggerated the product's actual effectiveness); *In re National Dynamics Corp.*, 82 F.T.C. 488 (1973) (performance claims concerning a product *had* a reasonable basis where company, acting in "good faith" and with "reasonable prudence," had relied upon technically deficient third party tests), *rev'd in part on other grounds*, 482 F.2d 1333 (2d Cir.), *cert. denied*, 419 U.S. 993 (1974); *In re Firestone Tire & Rubber Co.*, 81 F.T.C. 398 (1972) (claims that company's tires would stop cars "25% quicker" lacked a reasonable basis since substantiating test results made under abnormal road conditions could not be extrapolated to normal road conditions), *aff'd*, 481 F.2d 246 (6th Cir.), *cert. denied*, 414 U.S. 112 (1973).

97. See, e.g., *In re National Dynamics Corp.*, 82 F.T.C. 488, 549-50 (1973), *rev'd in part on other grounds*, 482 F.2d 1333 (2d Cir.), *cert. denied*, 419 U.S. 993 (1974); *In re Pfizer, Inc.*, 81 F.T.C. 23, 64, 67 (1972). It is on this ground that the ad substantiation doctrine is undoubtedly most vulnerable to criticism. As observed by the new Chairman of the Federal Trade Commission, James C. Miller III, the rule that an advertiser cannot establish the truth of his claims after the fact is somewhat analogous to having an IRS audit in which the taxpayer must either have his supporting records already on hand, or be flatly precluded from defending his otherwise valid claims, regardless of his good or bad faith. See Remarks of James C. Miller III, Chairman of Federal Trade Commission, before the American Advertising Federation, in Washington, D.C. (December 8, 1981).

Nevertheless, the "prior substantiation" requirement follows logically from the theoretical underpinnings of the ad substantiation doctrine itself, as currently articulated in Commission and court decisions. The underlying theory is that when an advertiser makes affirmative advertising claims, he thereby implies to the consumer that he already has reasonable data to substantiate the claims, resulting in consumer deception if he actually has no such data in his possession. See, e.g., *In re Sears, Roebuck & Co.*, 95 F.T.C. 406, 520-21 (1980), *enforced sub nom. Sears, Roebuck & Co. v. FTC*, 676 F.2d 385 (9th Cir. 1982); *Jay Norris, Inc. v. FTC*, 598 F.2d 1244, 1251-52 (2d Cir. 1979).

By somewhat modifying the theoretical basis of the doctrine, a less drastic rule would be possible. If it is instead argued that the inference of affirmative advertising claims is simply that the advertiser *can* substantiate the accuracy of the claims, then after-the-fact substantiation would still be possible. This more restricted view of the doctrine is not, however, the one found in the few litigated decisions on ad substantiation that have thus far appeared. See, e.g., the cases cited in note 96 *supra*.

The genesis of the doctrine was the *In re Pfizer, Inc.*⁹⁸ decision, in which the Commission announced that it is a violation of section 5 to "make an affirmative product claim without a reasonable basis for making that claim."⁹⁹ The case involved a nonprescription drug for use in the treatment of minor burns and sunburns. The manufacturer's advertisements expressly claimed that the product would "relieve pain fast" and "anesthetize nerves." While the company had not performed specific scientific tests to verify the accuracy of these claims, it had conducted a search of the medical literature and consulted with medical experts before making the claims.

The Commission dismissed the complaint, holding that the FTC staff had failed to prove that the literature search and expert opinion employed by the company did not constitute sufficient substantiation.¹⁰⁰ In so holding, the Commission set forth the basic framework of what has since become known as the "ad substantiation" doctrine. As further clarified in subsequent decisions by the Commission,¹⁰¹ the basic elements of the doctrine include the following.

First, express claims in advertisements must be supported by a prior "reasonable basis."¹⁰² The test of what constitutes a reasonable basis looks to that information which would satisfy a "reasonably prudent businessman," acting in "good faith," that his claims are supported by adequate evidence.¹⁰³ In making this determination, a number of factors may be relevant, such as the type and specificity of the claims; the nature of the product and possible consequences to the consumer if the claims are false; the extent to which consumers can make their own independent assessment of the validity of the claims; and the nature and availability to the advertiser of reliable evidence that would substantiate or refute the claims.¹⁰⁴

Second, the initial burden of proof in litigation is on the FTC staff to establish the general type of substantiating evidence required to make out a reasonable basis for particular claims.¹⁰⁵ Once this showing has been made, however, the advertiser must demonstrate that it possessed the requisite substantiating data before making the claims in question.¹⁰⁶

98. 81 F.T.C. 23 (1972).

99. *Id.* at 62.

100. *Id.* at 73-74.

101. *See, e.g.*, cases cited in note 96 *supra*.

102. *See, e.g.*, *In re Sears, Roebuck & Co.*, 95 F.T.C. 406, 520-521 (1980), *enforced sub. nom.* *Sears, Roebuck & Co. v. FTC*, 676 F.2d 385 (9th Cir. 1982); *In re Fedders Corp.*, 85 F.T.C. 38, 64-65 (1975), *aff'd*, 529 F.2d 1398 (2d Cir.), *cert. denied*, 429 U.S. 818 (1976); *In re Crown Cent. Petroleum Corp.*, 84 F.T.C. 1493, 1548-49 (1974); *In re Pfizer, Inc.*, 81 F.T.C. 23, 62 (1972).

103. *See, e.g.*, *In re National Dynamics Corp.*, 82 F.T.C. 488, 553 (1973), *rev'd in part on other grounds*, 482 F.2d 1333 (2d Cir.), *cert. denied*, 419 U.S. 993 (1974); *In re Pfizer, Inc.*, 81 F.T.C. 23, 64 (1972).

104. *See, e.g.*, *In re Peacock Buick, Inc.*, 86 F.T.C. 1532, 1564 (1975); *In re Firestone Tire & Rubber Co.*, 81 F.T.C. 398, 451-52 (1972), *aff'd*, 481 F.2d 246 (6th Cir.), *cert. denied*, 414 U.S. 1112 (1973); *In re Pfizer, Inc.*, 81 F.T.C. 23, 73 (1972).

105. *See, e.g.*, *In re National Dynamics Corp.*, 82 F.T.C. 488, 559-60 (1973), *rev'd in part on other grounds*, 482 F.2d 1333 (2d Cir.), *cert. denied*, 419 U.S. 993 (1974); *In re Pfizer, Inc.*, 81 F.T.C. 23, 73 (1972).

106. *See, e.g.*, cases cited in note 96 *supra*.

Third, the substantiating material must be in the advertiser's possession before it makes the advertising claims. Substantiation after the fact is no defense.¹⁰⁷

Fourth, substantiating data is not needed for literally every claim contained in an advertisement. Mere hyperbole or claims that constitute obvious puffing are not subject to the doctrine,¹⁰⁸ since consumers do not reasonably expect claims of this type to be backed up by actual supporting data.

Finally, good faith reliance upon the sort of data that would satisfy a reasonably prudent businessman is all that is required.¹⁰⁹ Hence, even though the supporting evidence is technically deficient, it may still provide a reasonable basis if the conditions of good faith and reasonable prudence are met.¹¹⁰

These basic principles are illustrated by the Commission's decision in *In re Firestone Tire & Rubber Co.*¹¹¹ In relevant part, the case involved advertising claims that improved Firestone tires would stop cars "25% quicker." Firestone had conducted tests on the accuracy of the claims under abnormal road conditions and had determined that the tires would, indeed, stop cars 25% faster than normal tires. It had not, however, conducted tests under normal road conditions, and expert opinion indicated that the tires might perform altogether differently under normal conditions.

The Commission, applying the basic analytical framework described above, held that the limited tests conducted by Firestone did not adequately substantiate the broad claims made.¹¹² Since the claims in issue involved a matter of "human safety," and were of a type that consumers could not reasonably "verify" for themselves, the Commission concluded that particularly rigorous substantiating data was essential. Specifically, a requirement of scientific test data was imposed¹¹³—a requirement that Firestone had failed to meet with the limited tests that it had conducted.

A further illustrative decision is *In re National Dynamics Corp.*¹¹⁴ This case involved affirmative advertising claims concerning the effectiveness of a battery additive. The company had the product evaluated repeatedly over a ten year period by six independent product testing laboratories. Some of the evaluations were actual product performance tests, while others were independent assessments of the validity of earlier tests. The tests generally supported the advertising claims in issue, but contained methodological flaws that discredited their validity as competent scientific tests. Notwithstanding

107. See the discussion and cases cited in note 97 *supra*.

108. See *In re Pfizer, Inc.*, 81 F.T.C. 23, 64 (1972).

109. See, e.g., *In re National Dynamics Corp.*, 82 F.T.C. 488, 556-57 (1973), *rev'd in part on other grounds*, 482 F.2d 1333 (2d Cir.), *cert. denied*, 419 U.S. 993 (1974); *In re Pfizer, Inc.*, 81 F.T.C. 23, 64 (1972).

110. See notes 114 & 115 and accompanying text *infra*.

111. 81 F.T.C. 398 (1972), *aff'd*, 481 F.2d 246 (6th Cir.), *cert. denied*, 414 U.S. 1112 (1973).

112. 81 F.T.C. at 449.

113. *Id.* at 451-52.

114. 82 F.T.C. 488 (1973), *rev'd in part on other grounds*, 482 F.2d 1333 (2d Cir.), *cert. denied*, 419 U.S. 993 (1974).

the defects in the tests, the Commission held that the company had sufficient substantiation for its claims, since the company had "reasonably" and "in good faith" relied upon the product evaluations.¹¹⁵ In so holding, the Commission placed particular emphasis upon the fact that the ad substantiation doctrine does not mandate the use of ideal or ultimate supporting evidence. Rather, the doctrine simply requires that advertisers exercise good faith and reasonable prudence in substantiating the validity of significant affirmative claims contained in their advertisements.

Unfair Advertisements That Are Not Deceptive

As noted earlier, an unfair act or practice is not always a deceptive act or practice.¹¹⁶ Instead, the concept of an "unfair" practice overlaps and goes beyond that of a "deceptive" practice. Thus, while a deceptive practice will also be considered unfair, an unfair practice can be something other than an outright deception.

In most advertising cases, this distinction will be of interest only to the legal semanticist, since the particular advertising practice in question will generally be considered both deceptive and unfair. Nevertheless, the Supreme Court has highlighted the potential importance of the distinction between the two terms. In *FTC v. Sperry & Hutchinson Co.*,¹¹⁷ the Court specifically rejected an argument that section 5 prohibits "only such practices" as are "in violation of the antitrust laws, deceptive or repugnant to public morals."¹¹⁸ Instead, the Court analogized the "fairness" powers of the Commission under section 5 to those of a "court of equity."¹¹⁹ The Court further provided general guidance concerning the broad concept of unfairness when it went on to cite the following governing factors with apparent approval: "(1) Whether the practice 'offends public policy' as prescribed by 'statutes, the common law . . . or other established concept[s] of unfairness;' (2) Whether the practice is 'immoral, unethical, oppressive or unscrupulous;' (3) Whether the practice 'causes substantial injury to consumers.'"¹²⁰

Thus, the legal precedent for finding a practice unfair that is not also deceptive does exist. Actual application of this distinction in the specific context of advertising, however, is all but non-existent. Moreover, the exact parameters of the unfairness doctrine have been left relatively vague and

115. 82 F.T.C. at 553, 556-57.

116. See notes 6-8 and accompanying text *supra*.

117. 405 U.S. 233 (1972). The case concerned alleged antitrust violations, not false advertising. Nevertheless, the Court's opinion contained statements that cut across the entire range of "unfair" practices under section 5, including consumer protection as well as antitrust matters.

118. *Id.* at 235, 244.

119. *Id.* at 244.

120. *Id.* at 244 n.5. See also *Spiegel, Inc. v. FTC*, 540 F.2d 287, 293 n.8 (7th Cir. 1976); *Heater v. FTC*, 503 F.2d 321, 323 (9th Cir. 1974); *In re Pfizer, Inc.*, 81 F.T.C. 23, 62 (1972).

uncertain by even the few cases that have addressed the issue, leaving many important questions unresolved. For example, what is meant by a practice that "offends public policy?" What types of "substantial injury to consumers" can be proscribed as unfair, even though not deceptive? And, most opaque of all, what is meant by a practice that is "immoral, unethical, oppressive, or unscrupulous?"

In an attempt to answer these and related questions, the Commission in late 1980 issued a formal Policy Statement addressed to a Senate subcommittee that outlined the general scope of its consumer unfairness jurisdiction.¹²¹ In this Statement, the Commission asserted that the primary focus of the unfairness standard is upon the third of the factors enumerated in *Sperry & Hutchinson*—"substantial injury to consumers." According to the Commission, a finding of unfairness can be premised on this ground alone, provided that three subsidiary conditions are satisfied. First, the consumer injury must be substantial. Second, the injury must outweigh any countervailing benefits to consumers or competition derived from the challenged practice. And third, the injury must not be something that consumers themselves could reasonably have avoided.¹²²

The Commission's Policy Statement next addressed the first of the factors identified in *Sperry & Hutchinson*—whether the practice "offends public policy." The Commission reasoned that while this consideration may occasionally serve as an independent ground for finding a practice unfair, it is customarily used as an indicator of whether the primary factor—substantial consumer injury—is present.¹²³ The Commission emphasized that, to be relevant, the policy must be "clear and well-established" and must consist of more than isolated viewpoints. Specifically, the public policy asserted as evidence of substantial consumer injury or as a separate ground for a finding of unfairness must be widely shared and embodied in formal sources such as statutes or judicial decisions.¹²⁴

Turning to the final factor listed in *Sperry & Hutchinson*—"unethical or unscrupulous conduct"—the Commission indicated that it does *not* intend to rely upon this factor alone. It observed that this consideration is essentially duplicative of the consumer injury inquiry, since "unethical" or "unscrupulous" conduct that would draw fire from the Commission would probably also cause substantial consumer injury. Accordingly, the Commission stated that future action by the agency based upon the consumer unfairness standard will look only to issues of clear public policy and, in particular, substantial consumer injury.¹²⁵

121. Letter from Federal Trade Commission to Honorable Wendell H. Ford, Chairman, Consumer Subcommittee, Committee on Commerce, Science and Transportation, United States Senate (Dec. 17, 1980), [1981] 5 TRADE REG. REP. (CCH) ¶ 50,421.

122. *Id.* at 55,948-949.

123. *Id.* at 55,949-950.

124. *Id.* at 55,950-951.

125. *Id.* at 55,951.

The analytical framework outlined in the Commission's Policy Statement follows the approach generally taken in the few litigated cases that have employed the consumer unfairness doctrine. For example, in one leading case, the Commission essentially employed the "consumer injury" and "public policy" considerations to hold that the practice of using a gambling scheme to induce children to buy products was unfair within the meaning of section 5.¹²⁶ Upon opening the product package, the children received either just the product, a prize, or what amounted to an extra price tag. The Supreme Court agreed with the Commission that this practice violated section 5, noting first that the practice did not involve an actual fraud or other deception.¹²⁷ Having dispensed with the deception theory, the Court went on to uphold the determination that the practice was unfair, reasoning that the practice was designed to "exploit consumers, children, who are unable to protect themselves" and involved an activity, gambling, "which the common law and criminal statutes have long deemed contrary to public policy."¹²⁸ In essence, the Court employed the same line of reasoning outlined in the Commission's Policy Statement. Thus, the practice was held "unfair" because it caused injury to a group of consumers unable to protect themselves; it contained no countervailing benefits; and it violated clear and widely shared concepts of public policy expressed in formal sources.

A more recent example of the manner in which the consumer unfairness doctrine has been applied is provided by *In re Raymond Lee Organization*.¹²⁹ The case involved a patent application service for inventors that proved to be of little real value to its users. The company's advertisements and other promotions falsely exaggerated the probable benefits provided by the service, and the Commission easily found these advertising practices to be both unfair and deceptive.¹³⁰ Of greater difficulty, however, was the issue of whether it was unfair for the company to retain money obtained from consumers for a service that was not only of far less value than they had been led to believe, but that was of little actual value. Answering this question in the affirmative, the Commission pointed to state court decisions ordering relief in analogous situations of fraud,¹³¹ and placed particular emphasis upon the substantial consumer injury that would result from allowing the company to retain the money under these circumstances.¹³² Once again, consumer injury and public policy were the guiding considerations utilized in finding a practice unfair.¹³³

In summary, while there is a definite paucity of clear precedent on the consumer unfairness doctrine, particularly as applied to advertising, some

126. *In re R.F. Keppel & Bros.*, 15 F.T.C. 276, 285 (1931).

127. *FTC v. R.F. Keppel & Bros.*, 291 U.S. 304, 309 (1934).

128. *Id.* at 313.

129. 92 F.T.C. 489 (1978).

130. *Id.* at 651-52.

131. *Id.* at 632.

132. *Id.*

133. *See also* cases cited in note 120 *supra*.

general considerations can be gleaned from the Commission's formal Policy Statement and from the limited case law available. First, the Commission has the authority to challenge an advertising practice as unfair that is not actually deceptive. Second, when making an unfairness determination, the Commission will focus primarily upon the apparent injury to consumers. The injury must be substantial, must not be outweighed by countervailing benefits, and must be of a type that consumers cannot reasonably avoid. Third, while public policy may constitute a separate theoretical ground for finding a practice unfair, it will normally serve merely as evidence of substantial consumer injury. In any event, the public policy must be embodied in formal sources and must be widely shared. Finally, while the Commission and the courts at one time indicated that amorphous concepts such as "ethics" and "morality" might serve as an alternative basis for finding a practice unfair,¹³⁴ the Commission has abandoned this earlier position. Instead, the Commission has stated its express intention to assess the unfairness of non-deceptive practices solely in terms of more concrete considerations of consumer injury, countervailing competitive or consumer benefits, and formal expressions of public policy.¹³⁵

CONCLUSION

If one message rings loud and clear from the preceding discussion, it is that the FTC law of advertising is not fixed and immutable. The subject is a protean one that continues to evolve with the development of additional case law. Nevertheless, several guiding questions can be deduced from the available precedent—questions that the advertiser or practitioner should ask when assessing the section 5 legality of a particular advertisement:

- (1) Is the advertisement subject to a specific FTC Trade Regulation Rule or Guide? If so, does it satisfy the requirements of the Rule or Guide?
- (2) Does the advertisement contain verbal representations that tend to be directly false or misleading to a significant group of consumers toward whom the advertisement is directed?
- (3) Does the advertisement contain nonverbal representations, such as pictures or performance demonstrations, that have the tendency or capacity to mislead a significant group of consumers within the target audience?
- (4) Does the advertisement contain representations that tell only part of the truth, while withholding information that discredits or contradicts the representations made?
- (5) Does the advertisement contain representations that have the tendency or capacity to deceive by innuendo, due to false or misleading inferences implicit in the representations?
- (6) Does the advertisement fail to disclose information that is material in the sense that its nondisclosure will tend to mislead consumers into erroneous assumptions as to the meaning of the advertisement?

134. See note 120 and accompanying text *supra*.

135. See notes 121-25 and accompanying text *supra*.

(7) Does the advertisement fail to disclose significant, nonobvious health or safety hazards associated with the product, or, possibly, non-safety-related product defects that subject consumers to substantial economic injury?

(8) Are significant express claims contained in the advertisement substantiated by prior reasonable supporting evidence, as determined by factors such as: the nature and specificity of the claims; the nature of the product; the possible consequences to the consumer if the claims are false; the extent to which consumers can make their own independent assessments of the validity of the claims; and the nature and availability of reliable substantiating evidence?

(9) Assuming that the advertising is not deceptive, is it nevertheless unfair, in light of: substantial consumer injury; the absence of off-setting benefits promoted by the particular practice in issue; and such formal expressions of public policy as statutes and judicial decisions?

No single list of factors can be all-inclusive, given the inherently complex nature of the law of advertising. Nevertheless, the considerations outlined above are certainly among those that have proved most troublesome, so that the advertisers would be wise to reconsider any advertising program that raises doubts concerning compliance with these factors.